

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

IN RE: Petition to initiate rulemaking to promulgate regulations setting forth how the antidegradation requirements and related data and information must be considered by states and the EPA when assessing waters pursuant to Section 303(d) of the Clean Water Act.

PETITION TO INITIATE RULEMAKING

Pursuant to Clean Waters Act (CWA) Section 303(c) and Section 553(e) of the Administrative Procedures Act (APA), Petitioners, Florida Wildlife Federation (FWF) and Alfred J. Davis and Cindy Davis (the Davises), respectfully petition the United States Environmental Protection Agency (EPA) to initiate two rulemaking actions related to the antidegradation requirements of adopted water quality standards when assessing waters for impairment pursuant to CWA Section 303(d). First, the Petitioners request EPA to initiate rule making for the development and promulgation of national regulations that address how antidegradation requirements must be considered by states and the EPA when assessing waters pursuant to CWA Section 303(d). Second, the Petitioners request EPA to amend 40 C.F.R. Section 130.7(b)(5) by adding new subsection 130.7(b)(5)(v) pertaining to the data and information that must be assembled and evaluated by states when assessing waters pursuant to Section 303(d) for compliance with the antidegradation requirements of applicable water quality standards. Existing C.F.R. §130.7(b)(5) with the proposed new underlined §130.7(b)(5)(v) reading as follows.

“(5) Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§130.7(b)(1) and 130.7(b)(2). At a minimum ‘all existing and readily available water quality-related data and information’ includes but is not limited to all of the existing and readily available water quality-related data and information about the following categories of waters:

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“(v) Waters identified by the State as not meeting the antidegradation requirements of applicable water quality standards. At a minimum, the process to identify whether waters meet the antidegradation requirements of applicable water quality standards shall include all existing data and information concerning Tier 1 existing shellfish, recreational, and aquatic life uses and associated water quality-related data and information on and after November 28, 1975; all existing water quality-related data and information since November 28, 1975 for calculating the baseline assimilative capacity of Tier 2 waters, and degradation of the Tier 2 baseline assimilative capacity; if a state has adopted Tier 2.5 criteria, all existing water quality-related data and information germane to establishing the applicable baseline existing ambient water quality of the Tier 2.5 waters; and all water quality-related data and information concerning the baseline water quality of Tier 3 outstanding national waters.”

The Petitioners respectfully contend the EPA has a duty to initiate these two proposed rulemaking actions. EPA has a non-discretionary duty under Section 303(d) of the CWA to approve or disapprove lists of impaired waters submitted by a state to EPA and, upon disapproval, to identify such waters as EPA determines necessary to attain the applicable water quality standards. EPA has the non-discretionary duty to consider the antidegradation requirements of applicable water quality standards, and all existing and readily available antidegradation water quality-related data and information.

To date, no state has ever performed this impaired waters assessment using the antidegradation standards and criteria of adopted water quality standards as required by CWA Section 303(d) and 40 C.F.R. §130.7(b). Nor has any state assembled and evaluated all existing and readily available water quality-related data and information relating to implementing applicable antidegradation requirements of applicable water quality standards under the current language of §130.7(b)(5). Nor has any state submitted documentation to support the state’s decisions not to use any existing and readily available water quality-related data and information for assessment of state waters for impairment under antidegradation standards and criteria, as required by §130.7(b)(6).

Likewise, EPA has never performed it's non-discretionary duty to assess waters for compliance with the antidegradation requirements of state water quality standards when reviewing state submitted Section 303(d) lists of impaired waters.

Because EPA has a non-discretionary duty to assess waters for compliance with the antidegradation requirements of state water quality standards when reviewing state submitted Section 303(d) lists of impaired waters, EPA has the duty to promptly develop and promulgate regulations that address how antidegradation requirements and related data and information must be considered by states in Section 303(d) assessments. This includes initiating rule making for the development and promulgation of regulations that address how antidegradation requirements must be considered by states and the EPA when assessing waters pursuant to Section 303(d) of the CWA, and promulgating the proposed §130.7(b)(5)(v) regulation proposed by the Petitioners containing the basic antidegradation water quality-related data and information which states, at a minimum, must assemble and evaluate in the Section 303(d) process. See, 33 U.S.C. Section 303(c)(4)(B); Coralations v. U.S. EPA, 477 F.Supp. 2d 413, 417-8 (D. P.R. 2007).

Once such data and information is assembled and evaluated by states under the proposed new §130.7(b)(5)(v), states will be required by existing §130.7(b)(6)(ii) and (iii) to describe the water quality-related data and information the state used to identify waters that do not meet the antidegradation requirements of applicable water quality standards, and to submit a rationale to support any state's decision not to use any existing and readily available water quality-related data and information for assessment of state waters for impairment under the antidegradation requirements of applicable state water quality standards.

Promulgation of the new §130.7(b)(5)(v) proposed by the Petitioners is the timely and necessary method for EPA to begin performing EPA's non-discretionary Section 303(d) duty to

implement the antidegradation requirements of applicable water quality standards. The proposed new §130.7(b)(5)(v) clearly and unquestionably requires states to assemble and evaluate all existing and readily available water quality-related data and information concerning the antidegradation requirements of applicable state water quality standards, which then ties this antidegradation water quality-related data and information assembly and evaluation by states with existing §130.7(b)(6) which requires states to describe the data and information the state used, and to provide a rationale for any state decision not to use any existing water quality-related data and information described in §130.7(b)(5). Descriptions of such data and information used by the state, along with a statement of a state rationale for any decision not to use any existing and readily available antidegradation water quality-related data and information is necessary for EPA to properly review determinations by states to list or not list waters for antidegradation reasons.

The CWA antidegradation policy has been in place since November 28, 1975, yet it has not yet been implemented in the development and review of Section 303(d) impaired waters as required by the CWA and EPA's regulations. This continued failure by states and the EPA for over 36 years to perform their mandatory duties under Section 303(d) to assess for compliance with the antidegradation requirements of applicable water quality standards is indefensible and must be promptly corrected.

Denial of this rule making petition would unlawfully withhold or unreasonably delay EPA's action to begin performing its non-discretionary Section 303(d) duty regarding the CWA's antidegradation requirements. See, 5 U.S.C. §706(1) (unlawfully withheld or unreasonably delayed action in violation of the Administrative Procedures Act).

INTERESTS OF THE PETITIONERS

FWF Interests

The FWF is duly incorporated under the laws of the State of Florida as a not for profit conservation protection corporation, and is a state affiliate of the National Wildlife Federation. The FWF's place of business is in Tallahassee, Florida, with regional offices with field representatives in Naples and St. Augustine, Florida. The FWF is a conservation organization comprised of over 14,000 members and approximately 60,000 supporters, with the corporate purposes of the FWF including the protection of the environment, protecting the fish and wildlife resources, and the protection of the air and water quality of the State of Florida and the nation. The FWF frequently represents the rights of its members who have used and enjoyed, and foreseeably will in the future use and enjoy, the waters of the nation for fishing, boating, swimming, and aesthetic purposes.

For decades the FWF has been actively advocating and litigating for the protection and improvement of water quality. Examples of FWF's advocacy include: FWF's involvement in the Everglades Consent Decree litigation (United States v. South Florida Water Management District, U.S. District Court, Southern District, Case No. 88-1886-CIV-Moreno); litigation concerning the back pumping of polluted water containing loathsome concoctions of chemicals into Lake Okeechobee (Florida Wildlife Federation v. South Florida Water Management District, 570 F.3d 1210 (11th Cir. 2009)(back pumping water litigation); a challenge to EPA's Water Transfer Rule (Friends of Everglades , Florida Wildlife Federation v. U.S. EPA, Eleventh Circuit Case No. 08-13652, and U.S. District Court, Southern District, Case No. 08-21785); litigation concerning TMDL's in Florida (Florida Wildlife Federation v. Browner, U.S. District Court, Northern District, Case No. 4:98CV356); and litigation over the failure of the State of

Florida and EPA to timely enact numeric nutrient water quality standards in Florida. Florida Wildlife Federation v. South Florida Water Management District, 647 F.3d 1296 (11th Cir. 2011) (numeric nutrient WQS litigation).

The Davises' Interests

The Davises reside at 2790 45th Street South, Gulfport, Florida 33711, on waterfront property with a dock on the Clam Bayou estuary, an arm of Boca Ciega Bay, Florida. The Davises have used and enjoyed, and foreseeably will in the future use and enjoy, the waters and natural resources of the water bodies in Florida and other states. The Davises' use and enjoyment of waters of Florida and other states is clearly within the zone of protection of the CWA.

On June 9, 2009 the Davises sued EPA regarding EPA's failure to enforce the CWA's antidegradation policy and implementation criteria. On December 20, 2010 the EPA and the Davises signed a settlement agreement concerning EPA's non-discretionary duty under Section 303(d) to consider the antidegradation requirements of applicable water quality standards when reviewing state Section 303(d) lists of impaired waters.

On Friday, May 25, 2012 EPA's Region IV office formally received Florida's recently adopted Section 303(d) updated list for Group 5 Waters. EPA is currently in the process of reviewing this Florida updated Group 5 waters list of impaired waters. Based upon information and belief, the Davises contend EPA's ongoing review is including consideration of the antidegradation requirements of Florida's water quality standards, and that EPA will consider all existing and readily available water quality-related data and information for Florida's Group 5 water bodies in this review, including water quality data and information relating to, inter alia, dissolved oxygen, total nitrogen, total phosphorus, biochemical oxygen demand, total kjeldahl nitrogen, turbidity, chlorophyll, color, salinity, specific conductance, sediment toxicity, bacteria,

mercury, polycyclic aromatic hydrocarbons, and shellfish maps developed by the Florida Department of Agriculture and Consumer Services (DOACS).

The Petitioners' proposed rulemaking requests will codify this EPA antidegradation implementation procedure, codification which is necessary for states to undertake the proper Section 303(d) assessments of waterbodies, and for EPA to timely perform its non-discretionary duty nationwide under CWA Section 303(d) to include antidegradation in its review of state submitted Section 303(d) lists of impaired waters.

THE CWA

The CWA is a comprehensive water quality statute enacted by Congress in 1972 as Public Law 92-500. The CWA is designed "to restore, and maintain the chemical, physical, and biological integrity of the nation's waters," and to obtain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 704 (1994). "To achieve these ambitious goals, the CWA provides two sets of water quality measures, effluent limitations and water quality standards." Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992); PUD No. 1 of Jefferson County, 511 U.S. at 712-713.

Effluent limitations are "any restriction established by a state or Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents ... from point sources..into navigable waters...". 33 U.S.C. §502(11). Effluent limitations can be technology-based limitations, or water quality-based limitations. 33 U.S.C. §301(b)(1).

Water quality standards amount to a description of the desired condition of a waterway, and consist principally of: (a) designated beneficial uses for waters, such as public water supply, recreation, protection and propagation of fish, shellfish and wildlife, and navigation; (b) water

quality criteria, which define the amounts of pollutants, in either numeric or narrative form, that the waters can contain without impairment of their designated beneficial uses; and (c) antidegradation requirements, which are designed to protect and maintain existing uses and waters whose quality exceeds that necessary to support designated beneficial uses. See, Settlement Agreement, Exhibit A.

CWA Section 303 “requires each state, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.” PUD No. 1 of Jefferson County, 511 U.S. at 704. The purpose of water quality standards is to “protect public health or welfare, enhance the quality of water and serve the purposes of the Act.” 33 U.S.C. §1313(c)(2)(A).

State adopted water quality standards must include an antidegradation policy, which is “a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.” PUD No. 1 of Jefferson County, 511 U.S. at 705; Kentucky Water Alliance v. Johnson, 540 F.3d 466, 471 (6th Cir. 2008); ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1320 (11th Cir. 1990)(the state antidegradation policy must be “consistent with and at least as stringent as the federal anti-degradation rule. 40 C.F.R. 131.12”). The CWA allows states to revise the antidegradation requirements of state water quality standards only if the revision is consistent with antidegradation policy established under the CWA preventing further degradation of the integrity of waterbodies, and is adopted pursuant to the CWA procedures for amendment of state water quality standards.” PUD No. 1 of Jefferson County, 511 U.S. at 704. See, Florida Public Interest Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1073 (11th Cir. 2004); Kentucky Water Alliance, 540 F.3d at 471.

The Supreme Court has explained that “water quality standards provide ‘a supplemental

basis.....so that numerous point sources, despite individual compliance with [technology based] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.” PUD No. 1 of Jefferson County, 511 U.S. at 704 (quoting EPA v. California ex rel State Water Resources Council Bd., 426 U.S. 200, 205 n. 12 (1976); Arkansas v. Oklahoma, 503 U.S. at 101; Kentucky Water Alliance, 540 F.3d at 471 (6th Cir. 2008).

Antidegradation Requirements

Antidegradation regulations are an integral part of the CWA, and provide important protections that are critical to the fulfillment of the CWA’s objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Memorandum from Ephraim S. King, Director of EPA Office of Science and Technology, to Water Management Division Directors, Regions 1-10 (August 10, 2005)(hereafter ‘King Memorandum’).

The first antidegradation policy was made on February 8, 1968, by the Secretary of the U.S. Department of Interior. Antidegradation was included in EPA’s first Water Quality Standards Regulation on November 28, 1975 (40 Fed.Reg. 55340-41), and was slightly refined and re-promulgated by EPA on November 8, 1983. (48 Fed.Reg. 51400). Antidegradation was further incorporated in CWA Section 303(d)(4)(B) through the 1987 amendments to the CWA, and the 1990 Great Lakes Critical Program Act in CWA Section 118(c)(2) requiring the Great Lakes water quality guidance include antidegradation policies and implementation procedures.

EPA’s antidegradation policy and methods of implementation are the minimum requirements which states must include in state water quality standards. (EPA Water Quality Handbook, Chapter: Antidegradation). EPA’s current regulations at 40 C.F.R §131.12 require each state to “develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy.”

The central purpose of the antidegradation regulations is to protect the assimilative capacity of water bodies. (King Memorandum). In short, a water body's assimilative capacity is a measurement of the amount by which its quality exceeds levels necessary to support fish, wildlife, and recreation. (Ibid). The antidegradation regulation review process ensures that the assimilative capacity of waters is maintained so as to avoid further degradation. Kentucky Waterway Alliance, 540 F.3d at 466, 484-85 (6th Cir. 2008).

EPA's Three Levels of Anti-degradation

EPA's regulations at 40 C.F.R. §131.12 require three levels of antidegradation water quality protection: Tier 1, Tier 2, and Tier 3. (EPA Water Quality Handbook, Chapter 4: Antidegradation).

Tier 1 protects existing uses by establishing the minimum water quality standard for all State waters, and requires that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." (40 C.F.R. § 131.12(a)(1)). Existing uses include shellfish harvesting and collection, recreational use, and aquatic life uses, which existed on and after November 28, 1975. (EPA Water Quality Handbook, Chapter 4: Antidegradation). The CWA and EPA's existing use regulation require compliance with designated use and the applicable water quality criteria. PUD No. 1 of Jefferson County, 511 U.S. at 713-15.

Tier 2 protects all high quality waters, which are waterways where "the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." (40 C.F.R. § 131.12(a)(2)). This difference between the applicable water quality criteria for a pollutant parameter and the ambient water quality for that parameter when it is better than the criterion is the assimilative capacity of Tier 2 waterways.

This assimilative capacity “shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic and social development in the area in which the waters are located.” (40 C.F.R. § 131.12(a)(2)). The Tier 2 process further requires states to “assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for non-point source control” in Tier 2 water bodies. (40 C.F.R. § 131.12(a)(2)).

Tier 3 waters are “[w]here high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.” 40 C.F.R. §131.12(a)(3).” Kentucky Waterway Alliance, 540 F.3d at 471.

States Additional Level of Antidegradation Protection

Several states have implemented, with EPA’s approval, a “Tier 2 Plus” high quality waters criteria which is generally known as Tier 2.5, with more stringent antidegradation requirements than EPA’s Tier 2 requirements. Tier 2.5 levels adopted by states protect designated high quality water bodies, and protect the existing ambient water quality of these water bodies from degradation. Florida’s OFWs antidegradation designations are an example of state adopted Tier 2.5 antidegradation requirements. The first Florida OFW criteria and designations of waterbodies was enacted by Florida in March of 1979.

Section 303(d) Impaired Waters Assessment

A critical part of the CWA’s pollution prevention and watershed protection mandate is the Section 303(d) impaired waters assessment requirement. Friends of the Swan River, Inc. v.

U.S. EPA, 130 F.Supp.2d 1184 1188 (D. Mont. 1999).

Section 303(d) is the interface between technology based effluent limitations in NPDES permits and water quality standards. (Ibid). Section 303(d) utilizes a water quality-based approach to insure that appropriate limitation on discharges are in place to achieve compliance with water quality standards. (Ibid). EPA's impaired waters regulations expressly provide that the Section 303(d) phrase "water quality standards applicable to such waters" refers to, and includes, numeric criteria, narrative criteria, water body uses, and antidegradation requirements. (40 C.F.R. 130.7(b)(3)).

Section 303(d)(1)(A) of the CWA requires each state to identify and prioritize those waters where technology-based controls are inadequate to attain water quality standards, including the inability to attain the antidegradation requirements of water quality standards.

EPA's regulations at 40 C.F.R. §130.7 are entitled "Total maximum daily loads (TMDL) and individual water quality-based effluent limitations," and is the process for identifying water quality limited segments for the restoration of such identified waterbodies and segments.

EPA's regulations at 40 C.F.R. §130.7(b)(1-3) provide that:

"(b) Identification and priority setting for water quality-limited segments still requiring TMDLs.

"(1) Each State shall identify those water quality-limited segments still requiring TMDLs within its boundaries for which:

(I) Technology-based effluent limitations required by sections 301(b), 306, 307, or other sections of the Act;

(ii) More stringent effluent limitations (including prohibitions) required by either State or local authority preserved by section 510 of the Act, or Federal authority (law, regulation, or treaty); and

(iii) Other pollution control requirements (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards (WQS) applicable to such waters.

(2) Each State shall also identify on the same list developed under paragraph

(b)(1) of this section those water quality-limited segments still requiring TMDLs or parts thereof within its boundaries for which controls on thermal discharges under section 301 or State or local requirements are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish and wildlife.

(3) For purposes of listing waters under §130.7(b), the term “water quality standard applicable to such waters” and “applicable water quality standards” refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.”

EPA’s regulations at 40 C.F.R. §130.2(j) defines “water quality limited segment” as:

“[a]ny segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of technology-based effluent limitations required by sections 301(b) and 306 of the Act.”

[“Water quality limited segment” may also be referred to as “WQLS”, “impaired waterbodies,” or “impairments” in this petition].

States must prioritize the WQBLs on the severity of their pollution and the presence of exceptional ecological or recreational attributes. See, 40 C.F.R. 130.7(b)(4).

States must submit their Section 303(d) identification and prioritization of WQBLs to EPA for review of the state’s Section 303(d) list. EPA must ensure that the list of WQLSs is consistent with the applicable state water quality standards. EPA has a non-discretionary duty under CWA Section 303(d) to approve or disapprove Section 303(d) lists submitted by a state to EPA and, upon disapproval, to identify such waters as EPA determines necessary to attain water quality standards.

In developing lists of WQLS pursuant to the requirements of §§130.7(b)(1) and 130.7(b)(2), each state “shall assemble and evaluate all existing and readily available water quality-related data and information.” 40 C.F.R. §130.7(b)(5). See, EPA’s February 19, 2008

Determination on Florida's Impaired Waters Rule, pg. 7; EPA's 1991 Guidelines for Water Quality-Based Decisions.

For antidegradation requirement evaluation purposes, "all existing and available water quality-related data and information" must consist of all data and information without screening for minimum sample size or age of the data. Exclusion of existing water quality-related data and information for minimum sample size or age of the data would illegally amend the anti-degradation requirements of adopted state water quality standards, as well as be inconsistent with the purpose and intent of the CWA's antidegradation policy. The Petitioners note that EPA has specifically exempted the antidegradation requirements from state adopted impaired waters rules (IWRs). Specifically, EPA's February 19, 2008 determination concerning Florida's 2007 IWR (Fla.Admin.Code Chapter 62-303) stated that "[n]o provision of the IWR relates to antidegradation." EPA Determination, pg. 8. This EPA determination was based upon the fact that cutoff dates for the age of water quality data and minimum number of samples would defeat the purpose and requirements of the CWA's antidegradation requirements of applicable water quality standards.

States must submit documentation to support the state's decision to list or not list waters. (40 C.F.R. 130.7(b)(6)). No state to date has ever performed a CWA Section 303(d) impaired waters assessment using the antidegradation standards and criteria of adopted state water quality standards as required by Section 303(d) and 40 C.F.R. §130.7(b)(1-3). Nor has any state submitted documentation to EPA supporting their decisions not to assess waters for impairment under the antidegradation standards and criteria.

While §130.7(b)(6)(iii) implies that states have a right to decide not to use certain data, it does not obviate the requirement in §130.7(b)(5) that states evaluate all existing and readily

available water quality-related data and information. Bright line cutoffs of water quality-related data and information is not permitted by §130.7(5)(b). “[S]tates are required by the CWA to identify *all* waterbodies that fail to meet water quality standards, 33 U.S.C. § 1313(d)(1)(A); states cannot shirk this responsibility simply by claiming a lack of current data.” Sierra Club v. Leavitt, 488 F.3d 904, 913 (11th Cir. 2007).

Waste Load Allocations and Total Maximum Daily Loads

Once water bodies have been identified as not meeting applicable water quality standards for one or more parameters, the CWA mandates that states establish “Total Maximum Daily Loads [TMDLs] at a level necessary to implement the applicable water quality standards,” standards which include antidegradation policy and implementation methodology. (33 U.S.C. Section 1313(d)(1)(c); 40 C.F.R. §130.2; 40 C.F.R. §130.7(3)).

The “CWA requires the establishment of ‘total maximum daily loads,’ not seasonal or annual loads.” Friends of the Earth, Inc. v. EPA, 446 F.3d 140, 143 ((D.C. Cir. 2006). Water quality-based effluent limitations in NPDES permits must be consistent with the applicable water quality standard.

TMDLs are based upon “load allocations” which are the portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. 40 C.F.R. 130.2(I).

Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. (40 C.F.R. 130.2(g)). Best estimates of the load must have information concerning the antidegradation baseline assimilative capacity of the basic parameters, alterations of flow, and sediments. Thus, it is critical EPA require states to assemble

and evaluate all existing and readily available water quality-related data and information concerning: antidegradation existing uses, and assimilative capacity, in order to prepare reasonably accurate of load allocations and water quality-based effluent limitations.

Waste load allocations are the portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. Waste load allocations constitute a type of water quality-based effluent limitation. (40 C.F.R. 130.2(h)). TMDL water quality-based effluent limitations must have assessment of anti-degradation requirements, a non-discretionary step which states and EPA have failed to take to date.

TMDLs must include a margin of safety (MOS) to account for any lack of knowledge concerning the relationship between wasteload allocations and water quality (§303(d)(1)(c); 40 C.F.R. §130.7(c)(1)). EPA's 1991 TMDL Guidance explains that the MOS may be implicit (i.e., incorporated into the TMDL through conservative assumptions in the analysis), or explicit (i.e., expressed in the TMDL as loadings set aside for the MOS). If the MOS is implicit, the conservative assumptions in the analysis that account for the MOS must be described. If the MOS is explicit, the loading set aside for the MOS must be identified.

The use of the information and data available affects not only the type of TMDL methodology to be used, it also affects the accuracy of the TMDL calculation, and the margins of safety of TMDLs. (64 Fed.Reg. 68788, center column).

Without Section 303(d) assessments of the antidegradation requirements of state water quality standards, TMDLs and the water quality-related effluent limitations are inaccurate and contrary to the requirements and intent of the CWA.

THE NEEDS FOR PROPOSED RULEMAKING

EPA determined on December 20, 2010, over 18 months ago, that EPA needs to adopt

regulations specifying how the antidegradation requirements, and antidegradation water quality-related data and information, must be considered by states and the EPA when assessing waters pursuant to Section 303(d) of the CWA. EPA needs to set forth methodology to timely initiate Section 303(d) antidegradation requirement assessments by states and EPA. Further EPA delay would be unreasonable, contrary to the requirements of the CWA, and arbitrary and capricious.

EPA must promptly promulgate rules that state: that the CWA does not provide for categorical type exemptions or de minimus individual decrease exceptions from Tier 1 and 2 antidegradation reviews under Section 303(d); that the “period of time” for Tier 1 and 2 antidegradation reviews under Section 303(d) is November 28, 1975; that all water quality data in the “period of time” must be assembled and evaluated regardless of age or numbers of samples; that all existing and readily available water quality-related data and information must be assembled and evaluated concerning water quality changes related to water quantity modifications since November 28, 1975; that all existing and readily available existing use shellfish harvesting data and information, and water quality-related data and information for those existing uses, must be assembled and evaluated regarding existing shellfish uses on or since November 28, 1975 for clams, oysters and scallops; that the baseline assimilative capacity of Tier 2 waters must be calculated for all water bodies, using November 28, 1975 as the beginning of the baseline “period of time”; that all existing and available water quality-related data and information must be assembled and evaluated concerning sediment water quality since November 28, 1975; and that antidegradation baseline assimilative qualities must be used in calculating and implementing TMDLs.

No Exceptions to Antidegradation Review Requirement

The CWA does not provide for any exceptions to antidegradation review, and the CWA

demands that any revision to effluent limitation standards be “consistent with the antidegradation policy established in under this section. 33 U.S.C. § 1313(d)(4)(B).” Kentucky Waterway Alliance v. Johnson, 540 F.3d 466, 483 (6th Cir. 2008).

EPA needs to specify that all antidegradation reviews, including antidegradation reviews of state categorical exceptions from antidegradation review, must be subject to Section 303(d) antidegradation review in order to establish the true and correct baseline assimilative capacity, against which current water quality-related data and information must be assessed to determine if cumulative degradation has occurred. Cumulative degradation of the baseline assimilative capacity of ten percent (10%) or more is significant degradation of Tier 2 assimilative capacity. Kentucky Waterway Alliance, 540 F.3d at 486-88.

This antidegradation review to establish the baseline assimilative capacity, parameter by parameter, must have public participation, be documented in writing, identify what alternatives to degradation of the assimilative capacity were considered by the state, identify what highest statutory and regulatory requirements were considered by the state, and identify what highest statutory and regulatory requirements were imposed by the state. If the Tier 2 highest statutory and regulatory requirement was not imposed, the state must document the reason why such requirement was not imposed. Without such documentation, cumulative degradation of assimilative capacity can not be accepted in a Section 303(d) analysis. Without such specificity by EPA regulations, EPA will be unable to implement the CWA antidegradation policy.

Only with Section 303(d) antidegradation review without exceptions can a determination be made whether significant cumulative degradation of assimilative capacity has occurred.

The Period of Record for Antidegradation Review

EPA needs to clearly instruct states and EPA Regional Offices that the applicable “Period

of Record” for Section 303(d) antidegradation reviews is November 28, 1975 for Tier 1, Tier 2 and Tier 3 requirements, and the date for Tier 2.5 requirements is that specified by the state Tier 2.5 rule (e.g., Florida’s OFW rule--one year prior to the date of designation of the waterbody as an OFW). It is critical EPA specify by regulation that all existing and readily available water quality-related data and information during the antidegradation Period of Record must be considered regardless of the age and the number of water quality samples and information.

Excluding existing water quality-related data and information during the Period of Record from Section 303(d) impaired waters antidegradation review due to the age of data or the number of samples would be an unauthorized revision of the baseline date for implementing the antidegradation requirements in previously EPA-approved state water quality standards. Water quality standards can only be amended or revised pursuant to the procedure in Section 303(c), not by implementation of a methodology that ignores older water quality-related data and information. Florida Public Interest Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1073 (11th Cir. 2004) (“the state’s water quality standards may only be revised if the change complies with the antidegradation policy which EPA regulations mandate each state adopt”). States cannot shirk the antidegradation requirements by throwing out water quality-related data. Sierra Club, Inc. v. Leavitt, 488 F.3d 906, 913 (11th Cir. 2007)(state and EPA must evaluate all existing and readily available data and information, there can not be an age cutoff). See, 40 C.F.R. 130.7(b)(5).

The Petitioners are unaware of any state adopted impaired waters rules concerning the methodology for listing WQLS that is applicable to the antidegradation requirements of applicable water quality standards. EPA’s February 19, 2008 determination concerning Florida’s 2007 Impaired Waters Rule (Fla.Admin.Code Chapter 62-303) stated that “[n]o provision of the

IWR relates to anti-degradation.” EPA Determination, pg. 8. This EPA determination was based upon the fact that cutoff dates for the age of water quality data, and minimum number of samples would defeat the purpose and requirements of the CWA’s antidegradation requirements of applicable water quality standards. Excluding antidegradation data and information would be an unauthorized revision of the antidegradation baseline date.

The Petitioners further note that the first threshold determination which EPA must make of a state’s impaired water rule methodology for identifying impaired waters under CWA Section 303(d) is whether the state’s methodology complied with the CWA, including the CWA’s antidegradation policy. Florida Public Interest Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004) (‘the EPA did not make a threshold determination whether the Impaired Waters Rule complied with the requirements of the Clean Water Act, including its antidegradation policy’). All impaired waters methodology must comply with the CWA’s antidegradation policy

Data and Information Needed of Existing Shellfish Uses

Tier 1 protects existing shellfish harvesting uses on or after November 28, 1975. EPA needs to require states to assemble and evaluate all of the existing and readily available data and information concerning the location of such existing uses for clam and oyster harvesting, and scallop collecting.

When states perform sanitation classifications of clam and oyster harvest, as does the State of Florida, EPA regulations must specify that states assemble and evaluate such data and information, especially all sanitation classifications since November 28, 1975. A reclassification of waterbodies where clams and oysters are harvested is changed from “Conditionally Approved” to “Conditionally Prohibited” or “Restricted” is degradation of water quality in

violation of Tier 1. The clam and oyster harvesting reclassification is documentation the water quality necessary to protect and maintain existing uses has been degraded in violation of the 1 requirement, and such watrebodies must be identified on Section 303(d) lists as impiared waters.

Under Florida's sanitation laws, clams and oysters harvested from waters classified by the Florida Department of Agricultural and Consumer Services (DOACS) as "Approved" or "Conditionally Approved" are safe to consume when harvested. Clams and oysters harvested in waters classified by DOACS as "Conditionally Prohibited" or "Restricted" waters must under go treatment at depuration facilities for "an appropriate time period and laboratory analyses" of the clams and oysters to ensure that they have been cleansed to the point that they are deemed safe by DOACS to consume. (<http://www.freshfromflorida.com/onestop/aqua/aquashell.html>). Any DOACS reclassification of waters for harvesting clams and oysters since November 28, 1975 of clam and oyster waters from "Approved" or "Conditionally Approved" to "Conditionally Prohibited" or "Restricted" is documented degradation of existing uses in waterways, a violation of the Tier I antidegradation requirement that existing uses shall be maintained and protected. See, PUD No. 1 of Jefferson County, 511 U.S. at 718-19. States and EPA must list waters where existing uses have not been maintained and protected as Section 303(d) Water Quality Limited Segments (impaired waters) for which TMDLs must be developed and implemented.

EPA must also specify that states must assemble and collect all existing and readily available data and information concerning scallop collection uses on and since November 28, 1975. Where existing use scallop collections have not been maintained and protected, the waterway must be listed as an Water Quality Limited Segment (impaired water) for which TMDLs must be developed and implemented.

Tier 2 Highest Statutory and Regulatory Requirements

EPA needs to define what constitutes the Tier 2 requirement of highest statutory and regulatory requirements for all new and existing point sources. States must demonstrate they imposed the Tier 2 “highest statutory and regulatory requirement.” This requires states to demonstrate they imposed, by methods such as effluent limitations in NPDES permits, stringent state regulations such as: advanced wastewater treatment; new source performance standards; higher stormwater treatment levels such as Florida’s Outstanding Florida Waters (OFW) stormwater requirement of fifty percent (50%) more treatment of stormwater; augmentation of stream flow and timing of stormwater discharges; removal of exemptions for developed sites from stormwater retrofitting at the time of redevelopment; requiring the installation of ALUM treatment and silt collection boxes in stormwater collection systems; requiring increased onsite stormwater treatment; and requiring more frequent septic tank inspections and retrofits.

Water Quantity Impacts on Water Quality

Antidegradation requirements apply to all factors which affect the water quality of surface waters, including water quality changes resulting from water flow reductions and diversions. PUD No. 1 of Jefferson County, 511 U.S. at 713-20. “In many cases, water quantity is closely related to water quality; a lowering of the water quantity in a body of water could destroy all of the designated uses, be it drinking water, recreation, navigation or, as here, as a fishery.” PUD No. 1 of Jefferson County, 511 U.S. at 719.

The Supreme Court has expressly held that “there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution.” PUD No. 1 of Jefferson County, 511 U.S. at 719. The CWA definition of pollution

(33 U.S.C. §1362(19)) includes the “the effects of reduced water quantity,” and §304 of the CWA “recognizes that water ‘pollution’ may result from ‘changes in the movement, flow, or circulation of any navigation waters..., including changes caused by the construction of dams.” 33 U.S.C. §1314(f).” PUD No. 1 of Jefferson County, 511 U.S. at 719-20. Consideration of the water quality impacts of stream flow alterations is necessary to implement the Tier 1 and Tier 2 antidegradation requirements of the applicable water quality standards. PUD No. 1 of Jefferson County, 511 U.S. at 718-19.

EPA must specify that the Tier 1 requirements prohibit reductions in stream flows that degrade water quality to the point of eliminating any existing use, as well as, prohibit the degradation of water quality in violation of the water quality standards.

Consideration of the water quality impacts of stream flow alterations is necessary to implement the Tier 1 antidegradation requirements of the applicable water quality standards. See, PUD No. 1 of Jefferson County, 511 U.S. at 718-19 (“EPA has explained that under its antidegradation regulation, ‘no activity is allowable...which could partially or completely eliminate any existing use.’ EPA, Questions and Answers on Antidegradation (Aug. 1985)”. State antidegradation policy must be implemented in a manner consistent with existing uses of streams. PUD No. 1 of Jefferson County, 511 U.S. at 719. Section 303(d) review of the reduction of minimum stream flow effect on water quality, including antidegradation requirements, is proper and necessary under the CWA. Ibid.

States and EPA must consider all water quantity modifications since November 28, 1975 that cause pollution (i.e., degradation of Tier 2 and Tier 2.5 waters). The water quantity modifications which must be considered include: surface flow reductions, reductions of

groundwater inflows into surface waters, and the alteration of flows causing sudden surges of fresh water salinity shock that degrades aquatic flora and fauna diversity in waterways.

Sediment Degradation

The antidegradation requirements of Tier 2 and Tier 2.5 apply to sediments because a wide variety of aquatic life, including worms, clams, mussels, crustaceans, and insects, exist in sediments, and EPA has recognized that sediments are subject to water quality standards. Contaminated sediments can be lethal to benthic organisms such as crustaceans and insect larvae. These creatures occupy an important position in the food chain that leads up to commercial and recreational size fish, and to fish eating wildlife such as mink, pelicans, cormorants, osprey, and bald eagles. The EPA settlement agreement with the Davises acknowledged that EPA's Section 303(d) assessment would consider all existing and readily available water quality-related data and information concerning sediment toxicity and polycyclic aromatic hydrocarbons in sediment.

Need for Proposed New Section 130.7(b)(5)(v)

On December 20, 2010, over 18 months ago, EPA acknowledged it had a non-discretionary duty under CWA Section 303(d) to approve or disapprove Section 303(d) lists submitted by a state to EPA, and upon disapproval, EPA must identify the waters that EPA determines do not meet applicable WQSs, including antidegradation requirements.

Enactment of the proposed new 40 C.F.R. 130.7(b)(5)(v) notifies states of the data and information which states must assemble and evaluate in the development of the water quality limited segments required by §§130.7(b)(1) and 130.7(b)(2). EPA must promptly notify states of the documentation that states must assemble and evaluate, a critical state step for EPA to begin

performing its nondiscretionary Section 303(d) duty, a review which is long over due. Further delay is not justified.

The proposed 130.7(b)(5)(v) language ties in with the provisions of existing §130.7(b)(6) that requires states to provide EPA with the documentation of the data and information used, how the state used this data and information, and a rationale for the state's decision to not use any of the data and information described in §130.7(b)(5).

The specific requirements of proposed 130.7(b)(5)(v) are the type of data and information which must be assessed in Section 303(d) assessments of antidegradation requirements of applicable water quality standards.

WHEREFORE the FWF and the Davises respectfully petition the EPA to initiate rule making to promulgate the above proposed new 40 C.F.R. §130.7(b)(2)(v) regulation, and develop and promulgate a regulation that states how antidegradation requirements must be considered by states and the EPA when assessing waters pursuant to Section 303(d) of the Clean Water Act.

Respectfully submitted this 8th day of June, 2012.

/S/
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